Supreme Court, U.S.
FILED
JAN 13 1992
OFFICE OF THE CLERK

(2)

No. 91-1031

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE STUART HACK COMPANY, ET AL.,
Petitioners,

v.

RICHARD SHOFER,
Respondent.

Petition for Writ of Certiorari to the Court of Appeals of Maryland

---

RESPONDENT'S BRIEF IN OPPOSITION

ANTHONY P. PALAIGOS
THOMAS A. BOWDEN *
BLUM, YUMKAS, MAILMAN,
GUTMAN & DENICK, P.A.
1200 Mercantile Bank
& Trust Building
2 Hopkins Plaza
Baltimore, Maryland 21201
Attorneys for Respondent

* Counsel of Record

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT:

THE DECISION BELOW DOES NOT RAISE THE QUESTION PRESENTED BY THE PETITION 4

A. The Maryland Court of Appeals Correctly Decided That Respondent's Claims Do Not "Relate To" an Employee Benefit Plan. 5

B. The Court Below Did Not Adopt a *Per Se* Rule That Claims Against Nonfiduciaries Are Immune from ERISA Pre-Emption. 15

C. Respondent's State Law Claims Do Not Supplement Rights Already Secured By ERISA. 21

CONCLUSION 24

TABLE OF AUTHORITIES

Cases: Page

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) 8
Consolidated Beef Indus., Inc. v. New York Life Ins. Co., ____ F.2d ____ (8th Cir. 1991) (WESTLAW 1991 WL 239612) . . 9-10
Duffy v. Cavalier, 215 Cal. App. 3d 1517, 264 Cal. Rptr. 740 (1989) 3-4
FMC Corp. v. Holliday, 498 U.S. ____, 111 S. Ct. 403 (1990) 8, 9
Gibson v. Prudential Ins. Co., 915 F.2d 414 (9th Cir. 1990) 10
Howard v. Parisian, Inc., 807 F.2d 1560 (11th Cir. 1987) 10
Ingersoll-Rand Co. v. McClendon, 498 U.S. ____, 111 S. Ct. 478 (1990) 9, 11-13, 14
Jordan v. Reliable Life Ins. Co., 694 F. Supp. 822 (N.D. Ala. 1988) 19-20
Kelly v. Pan-American Life Ins. Co., 765 F. Supp. 1406 (W.D. Mo. 1991) 18-19
Light v. Blue Cross and Blue Shield of Alabama, Inc., 790 F.2d 1247 (5th Cir. 1986) 9
Mackey v. Lanier Collections Agency & Serv., Inc., 486 U.S. [] (1988) 12
McClendon v. Ingersoll-Rand Co., 779 S.W.2d 69 (Tex. 1989) 12

Metropolitan Life Ins. Co. v. Travelers Ins. Co., 471 U.S. 722 (1985) 7
Painters of Philadelphia Dist. Council No. 21 Welfare Fund v. Price Waterhouse, 879 F.2d 1146 (3rd Cir. 1989) 16-17, 20
Pappas v. Buck Consultants, Inc., 923 F.2d 531 (7th Cir. 1991) 20
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 9
Pizlo v. Bethlehem Steel Corp., 884 F.2d 116 (4th Cir. 1989) 10
Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 7, 8, 9, 14
Sparks v. Mo-Kan Iron Workers Pension Fund, 765 F. Supp. 566 (W.D. Mo. 1990) 19

Statutes:

26 U.S.C. § 72(p) 1-2, 6, 13
26 U.S.C. § 4975 13
29 U.S.C. §§ 1001-1461 5
29 U.S.C. § 1106(a)(1)(B) 13
29 U.S.C. § 1108(b)(1) 13
29 U.S.C. § 1109 15
29 U.S.C. § 1132 15
29 U.S.C. § 1132(a) 9
29 U.S.C. § 1132(a)(2) 21, 22
29 U.S.C. § 1140 9
29 U.S.C. § 1144(a) 5, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1031

THE STUART HACK COMPANY, ET AL.,
Petitioners,

v.

RICHARD SHOFER,
Respondent.

Petition for Writ of Certiorari to the Court of Appeals of Maryland

---

RESPONDENT'S BRIEF IN OPPOSITION

Richard Shofer, Respondent, respectfully requests that this Court deny the Petition for Writ of Certiorari filed by The Stuart Hack Company and Stuart Hack, Petitioners.

STATUTES INVOLVED

In addition to statutes recited by the Petitioners, § 72(p) of the Internal Revenue Code, 26 U.S.C.

§ 72(p), is relevant:

> "Sec. 72(p). Loans treated as distributions.--For purposes of this section--
>
> (1) Treatment as distributions.--
>
> (A) Loans.--If during any taxable year a participant or beneficiary receives (directly or indirectly) any amount as a loan from a qualified employer plan, such amount shall be treated as having been received by such individual as a distribution under such plan.
>
> (B) Assignments or pledges.--If during any taxable year a participant or beneficiary assigns (or agrees to assign) or pledges (or agrees to pledge) any portion of his interest in a qualified employer plan, such portion shall be treated as having been received by such individual as a loan from such plan.
>
> * * *."

STATEMENT OF THE CASE

Respondent draws the Court's attention to the following deficiencies in Petitioners' Statement of the Case:

Petitioners state that the only source of their professional duties to Respondent was the Catalina Enterprises, Inc. Pension Plan itself (the "Plan"). (Pet. 4, 11). The

Petitioners further imply that their duties ran to Respondent only in Respondent's capacity as trustee of the Plan. (Pet. 4). The upshot is to create the mistaken impression that Petitioners' relationship with Respondent sprang entirely from the Plan itself and thus, for purposes of pre-emption analysis, related to the plan as a matter of law. But to create this impression, Petitioners rely upon Counts IV through VIII of the Complaint, which counts are no longer in the case. (App. 21a-22a). The dismissal with prejudice of these counts, which were pleaded in the alternative (App. 21a), was affirmed by the Maryland Court of Appeals and is not questioned by any party here.[1] Thus, Petitioners' reliance on them, here and elsewhere in their Statement of the Case, is inappropriate.

Instead, Respondent would draw this Court's attention to the Facts Common to All Counts and to Count I of the Complaint, sounding in common law negligence. (App. 27a-30a). There, it is plain that the source of Petitioners' duty to Respondent lay elsewhere than the Plan, in the common law obligation of professionals to exercise ordinary care. (App. 30a). *See Duffy v. Cavalier,* 215 Cal. App. 3d 1517, 264 Cal. Rptr. 740, 748 (1989) (duties imposed by virtue of

---

1. In fact, Respondent originally sought to voluntarily dismiss the ERISA counts but could not obtain Petitioners' consent, which was required under the Maryland rules of procedure. (App. 6a n.4).

parties' capacity as stockbrokers only, not relationship with employee benefit plan). And when Respondent sought Petitioners' advice about borrowing money from Respondent's voluntary account in the Catalina plan, Respondent was acting in his capacity as a *beneficiary* of the Catalina plan. (App. 4a). The fact that he was also trustee of the plan was fortuitous, with respect to the erroneous tax advice that forms the core of Respondent's lawsuit.

REASONS FOR DENYING THE WRIT

THE DECISION BELOW DOES NOT RAISE THE QUESTION PRESENTED BY THE PETITION.

Petitioners offer one question for this Court's consideration: Whether ERISA pre-empts state law malpractice claims against a nonfiduciary professional, where the claims are "related to and premised upon an employee benefit plan." (Pet. i). But the Court of Appeals of Maryland did not decide that issue. Rather, the Court ruled, on the basis of factual allegations unique to this case, that Respondent's claims *do not* "relate to" an employee benefit plan within the meaning of ERISA's pre-emption clause. (App. 18a). That finding, coupled with the Petitioners' nonfiduciary status and the absence of any other ground for pre-emption, necessitated the Court's holding. Contrary to the Petitioners' contentions, the Court of Appeals never

reached the issue of a nonfiduciary's liability where the claims "relate to" an employee benefit plan. And the Court certainly did not adopt a *per se* rule that claims against nonfiduciaries are immune from ERISA pre-emption even if the claims "relate to" an employee benefit plan. Thus, the instant case does not present an opportunity for this Court to address any important federal question or to resolve any conflict among the lower courts.

A. The Maryland Court of Appeals Correctly Decided That Respondent's Claims Do Not "Relate To" an Employee Benefit Plan.

The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1985 & Supp. 1991) ("ERISA"), pre-empts state laws that "relate to" an employee benefit plan. 29 U.S.C. § 1144(a). In a carefully reasoned opinion, the Court of Appeals of Maryland demonstrated that Respondent's state law claims do not "relate to" such a plan. (App. 1a-23a). This opinion was based on factual allegations unique to this case, which allegations may be briefly summarized as follows:

Respondent, as an employee of Catalina Enterprises, Inc. ("Catalina"), was a participant in the Plan. (App. 28a). He had previously deposited $209,415.95 in his voluntary account in the Plan. (App. 28a). He asked Petitioners, who were nonfiduciary consultants, whether

he could borrow from the voluntary account; Petitioners said yes. (App. 28a-29a, 44a-45a). Respondent, based on his course of dealing with Petitioners over the years, reasonably expected that Petitioners would alert him to any possible tax consequences of such borrowing. (App. 28a-29a, 44a-45a). Petitioners failed to do so. (App. 28a-29a). As a result, Respondent incurred substantial tax liabilities that would have been avoided had Petitioners given accurate advice. (App. 29a).

Respondent then sued Petitioners in the Circuit Court of Maryland for Baltimore City, to recover the personal taxes, interest, penalties, and consequential expenses that resulted from the borrowing. (App. 29a). In the ensuing litigation, Catalina and the Plan stood above the fray. Neither Catalina nor the Plan itself was a party to the proceeding below. Respondent did not seek benefits, or any monetary recovery, from the Plan. Nor did he seek any relief that would affect the administration of the Plan in any way. In short, nothing in Respondent's Complaint sought to affect Catalina or the Plan in any way.

If the case had proceeded to trial, Petitioners' liability would not have turned on the construction, interpretation, or application of ERISA or an ERISA plan. (App. 12a). Respondent's damages would not have been measured by a difference in plan benefits (App. 14a). Rather, the measure of damages would be found in § 72(p) of the Internal Revenue Code. (App.

14a). Finally, all damages would be recovered from Petitioners personally, not from Catalina or the Plan.[2] There was no third-party claim of indemnification by Petitioners against Catalina or the Plan.

Against this factual background, the Court of Appeals of Maryland concluded that Respondent's state law claims were not pre-empted by ERISA. "It is hard to imagine," the Court stated, "that Congress intended to preempt an action in which all potential damages would be paid by a nonfiduciary and would not inure to a plan" and where the alleged negligence "*is as removed from the plan as here*." (App. 18a) (emphasis added). In so ruling, the Court in no way departed from prior decisions of this Court or from the Congressional intent manifest in ERISA.

This Court has consistently given the phrase "relate to" its "broad common-sense meaning," *Metropolitan Life Ins. Co. v. Travelers Ins. Co.*, 471 U.S. 724, 739 (1985), such that a state law "'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan," *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). This Court has adopted this interpretation in order to carry

---

2. Because Petitioners impleaded Grabush, Newman & Co., P.A. ("Grabush"), Shofer's accountants, the possibility exists that Petitioners would not be solely liable for all damages. However, a judgment against Grabush would have no effect whatsoever upon Catalina or the Plan.

out Congress' intent to "establish pension plan regulation as exclusively a federal concern." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981).

This Court and others have uniformly given effect to ERISA pre-emption where state laws refer to or have significant connections with benefit plans and the employers who sponsor them. The reasons for pre-emption fall into several categories:

1. *Conflicting and variable burdens.* Congress intended to protect benefit plans from state laws that impose "conflicting or inconsistent State and local regulation of employee benefit plans." *Shaw,* 463 U.S. at 85, *quoting* 120 Cong. Rec. 29933 (1974) (remarks of Sen. Williams). Thus, in cases where state laws would subject employers and plans to variable burdens, ERISA pre-emption applies. *See, e.g., FMC Corp. v. Holliday,* 498 U.S. ____, 111 S. Ct. 403, 408-09 (1990) (differing state anti-subrogation laws would frustrate plan administrators' ability to calculate uniform benefit levels nationwide); *Shaw,* 463 U.S. at 85 & n.25 (differing state laws concerning pregnancy-related benefits would cause employers to administer their plans differently in each State in which they have employees, resulting in inefficiencies and lower benefit levels).

2. *Specific reference to benefit plans.* State laws that specifically refer to benefit plans are likely to "relate to" such plans within the meaning of ERISA.

See, e.g., FMC Corp., 111 S. Ct. at 408 (anti-subrogation statute expressly refers to amounts paid by employee benefit plans); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. ____, 111 S. Ct. 478, 481-83 (1990) (Texas' judicially created wrongful discharge cause of action specifically premised on public policy of protecting employees' interests in pension plans).

3. *Direct conflict with ERISA cause of action.* Where ERISA specifically regulates a certain area, state laws in that area are clearly pre-empted.[3] *See, e.g., Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987) (29 U.S.C. § 1132(a) exclusive vehicle for actions asserting improper processing of claim for benefits); *Ingersoll-Rand*, 111 S. Ct. at 484-85 (state wrongful discharge claim falls squarely within ambit of 29 U.S.C. § 1140). Lower federal courts and state courts have consistently found Congressional intent to pre-empt in similar situations. *See, e.g., Light v. Blue Cross and Blue Shield of Ala., Inc.*, 790 F.2d 1247, 1249 (5th Cir. 1986) (state law causes of action for improper handling of claims under benefit plans); *Consolidated Beef Indus., Inc. v. New York Life Ins. Co.*, ____ F.2d ____ (8th Cir. 1991) (WESTLAW 1991 WL 239612) (state law claims concerning inaccurate billings, incorrect interest

---

3. This is not to say that ERISA pre-emption applies only to state laws dealing with the subject matter covered by ERISA. *FMC Corp.*, 111 S. Ct. at 408; *Shaw*, 463 U.S. at 98 (discussing legislative history).

rates, and lack of annual statements, arising directly from administration of a plan); *Gibson v. Prudential Ins. Co.*, 915 F.2d 414, 417 (9th Cir. 1990) (state law claims centering entirely on denial of disability benefits under plan); *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1564-65 (11th Cir. 1987) (state law claims for wrongful termination of benefits).

The instant case, on its facts, does not implicate any of these concerns. As the Maryland Court of Appeals explained in discussing *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116 (4th Cir. 1989) (App. 13a-14a), exposing consultants like the Petitioners to malpractice claims does not submit employers or plans to conflicting obligations or variable standards of recovery. Employers do not have to administer their plans differently. No uncertainty or confusion results as to the eligibility of claimants, calculation of benefit levels, disbursement or denial of benefits, monitoring of funds, or keeping of records. No inefficiencies, added costs, or lower benefit levels ensue. Benefit plans emerge unscathed by suits such as Respondent's. Nor are employers or benefit plans required to keep track of multifarious state laws. Moreover, state malpractice laws make no specific reference to employee benefit plans; Maryland's common law of malpractice is of general applicability to all professionals. Finally, the instant case does not conflict, directly or indirectly, with any ERISA cause of action. Respondent does not seek recovery of benefits.

For all these reasons, Respondent's state law claims simply do not "relate to" the Catalina Plan, and therefore the Court of Appeals' decision was proper. Hence, there is no conflict between the decision below and the cases, cited by Petitioners, which hold that "ERISA preemption does not depend upon whether or not suit is brought against a fiduciary, but rather, upon whether the State law claims asserted 'relate to' an ERISA plan." (Pet. 16-17).

In their effort to show that Respondent's claims "relate to" the Plan, Petitioners seize upon two phrases from this Court's decision in *Ingersoll-Rand,* 111 S. Ct. at 483, and argue that any claim which is "premised on the existence of a pension plan," or for which "the existence of a pension plan is a critical factor in establishing liability," is pre-empted by ERISA. (Pet. 9-11). This argument would have merit, provided that those phrases were used in the same sense as in *Ingersoll-Rand.* Petitioners, however, have wrenched those phrases out of context in an apparent attempt to convince this Court that any state law claim involving *in any way* the existence of a benefit plan is pre-empted by ERISA. This argument proves too much.

In *Ingersoll-Rand,* this Court held that ERISA preempted a state wrongful discharge claim by an employee against his employer. 111 S. Ct. at 481. The employee charged that his employer had fired him, just prior to his vesting in the employer's pension plan, in order to

avoid making contributions to his pension fund. *Id.* The employer obtained summary judgment because the employment was terminable at will. *Id.* On appeal the Texas Supreme Court reversed and remanded for trial, recognizing a public policy exception to the employment-at-will doctrine. *Id.* The Texas Court concluded that "the state has an interest in protecting employees' interests in pension plans" and that an employee may recover for wrongful discharge if he can establish that "the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund." *Id., quoting McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d 69, 71 (Tex. 1989).

In this specific factual context, this Court found ERISA pre-emption, noting that the Texas cause of action "makes specific reference to, and indeed *is premised on,* the existence of a pension plan." 111 S. Ct. at 483 (emphasis added). Thus, because the state law was explicitly intended to regulate the conduct of employers who sponsor pension plans, the case came under the general principle that state laws which are "specifically designed to affect employee benefit plans" are pre-empted. *Id.*, quoting *Mackey v. Lanier Collections Agency & Serv., Inc.*, 486 U.S. 825, 829 (1988). Here, by contrast, Maryland's professional malpractice laws are not specifically designed to regulate the conduct of ERISA entities, nor do they have that effect. Respondent's claims against Petitioners are not "premised

on" the existence of a pension plan in the way this Court used that phrase in *Ingersoll-Rand.*

This Court also stated that "the existence of a pension plan is a critical factor in establishing liability under the State's wrongful discharge law." *Ingersoll-Rand,* 111 S. Ct. at 483. In this passage, the Court was contrasting the Texas cause of action with "generally applicable" laws that make no reference to, or function irrespective of, the existence of an ERISA plan. *Id.* Here, Respondent sued Petitioners under just such a generally applicable law, Maryland's common law of professional malpractice. So, the existence of a pension plan is not a "critical factor" here in the same sense as that phrase was used in *Ingersoll-Rand.*[4]

Contrary to Petitioners' argument in Section A of

---

4. Petitioners also assert that because borrowing money from a pension plan is regulated by ERISA, 29 U.S.C. §§ 1106(a)(1)(B) and 1108(b)(1), and taxed by § 4975 of the Internal Revenue Code (originally part of ERISA), therefore Respondent's claims relate to a "central concern" of ERISA. (Pet. 11). However, all of the cited sections refer to prohibited transactions, which form no part of the Respondent's case. (Pet. 8; App. 20a-21a). The tax liabilities imposed by § 72(p) of the Internal Revenue Code and sought by Respondent as damages are in no way linked to prohibited transactions. Besides, the whole issue of ERISA's "central concerns" arose only in discussing the subsidiary issue of whether federal common law should enlarge upon ERISA remedies. Hence, Petitioners' references to prohibited transactions are inappropriate.

the Petition, *Ingersoll-Rand* does not announce a new "premised upon" test for ERISA pre-emption. Nor do the "premised upon" and "critical factor" phrases have talismanic power to transform a tenuous, remote, and peripheral relationship into a substantial one. *See Shaw,* 463 U.S. at 100 n.21. Boiled down to its essentials, Petitioners' argument is that, but for the existence of the Catalina Plan, Respondent would never have had occasion to seek advice on borrowing from the Catalina Plan. This is tautology masquerading as argument.

Finally, Petitioners state: "Varying standards of professional liability, as applied to pension plans, are a hindrance to ERISA's objectives." (Pet. 11). This neat phrasing skirts the key issue: whether Maryland's standards of professional liability actually apply to or affect a pension plan. In the instant case, the Maryland Court of Appeals says no. Absent any significant effect on a benefit plan, ERISA is not designed to erase state laws regulating professional liability.[5] Petitioners have failed

---

5. Although the Petitioners were under contract to Catalina to perform consulting services involving the Plan, it was purely fortuitous that Respondent chose to consult Petitioners, rather than some other adviser, before borrowing from his voluntary account in the Plan. Yet according to the Petitioners' argument, if Respondent had walked across the street and consulted a tax adviser who had never heard of the Catalina Plan, a malpractice claim against that adviser would be pre-empted by ERISA because it would be "premised upon" the existence of a plan, and a plan's existence would be a "critical factor" in establishing liability.

to demonstrate that any of ERISA's objectives are hindered by Respondent's lawsuit.

B. The Court Below Did Not Adopt a *Per Se* Rule That Claims Against Nonfiduciaries Are Immune from ERISA Pre-Emption.

Petitioners strain to enlarge beyond all reason the importance of the fiduciary-nonfiduciary issue in the decision below. What is labeled by the Petitioners as the "cornerstone" of the opinion (Pet. 14) was instead simply a preliminary determination that did not control the final outcome. Section III of the opinion below discusses the fiduciary-nonfiduciary issue, concluding with these words: "Consequently, *our analysis proceeds* by treating the respondents as nonfiduciary consultants to the plan." (App. 9a) (emphasis added). Petitioners' fiduciary status was a legitimate threshold issue because, had it been clear as a matter of law that Respondent was suing Petitioners for breach of fiduciary duties, federal pre-emption would have been obvious, both express pre-emption under 29 U.S.C. § 1144(a) and implied pre-emption due to direct conflict with ERISA remedies under 29 U.S.C. §§ 1109 and 1132.[6] But contrary to Petitioners' argument, their nonfiduciary status did not doom their efforts to invoke ERISA pre-emption.

---

6. Petitioners concede as much in Section B of their Petition. (Pet. 12-13).

If the fiduciary-nonfiduciary issue had indeed been the "cornerstone" of the opinion, the opinion could have ended after Section III. Instead, the Court of Appeals proceeded to analyze the basic issue: whether the state law claims "relate to" an employee benefit plan. After analyzing the facts in conjunction with relevant cases, the Court reached its conclusion:

> "When respondents' nonfiduciary status is considered *along with the conduct at issue and the type of damages sought,* we do not believe that Congress could have intended to preempt this particular action. The conduct at issue here is simply a failure to give competent tax advice about an ERISA distribution. If Congress intended to preempt such conduct against nonfiduciaries, then arguably a tax adviser with *no* relationship to an ERISA plan who negligently advised a client that an ERISA distribution was nontaxable would be immune from liability. Moreover, the damages sought are simply the amounts Shofer *personally expended* because of the allegedly negligent failure to advise. It is hard to imagine that Congress intended to preempt an action in which *all potential damages would be paid by a nonfiduciary and would not inure to a plan.* Where the alleged negligence of a nonfiduciary plan administrator *is as removed from the plan as here,* and 'in the absence of an explicit corresponding provision in

> ERISA allowing a progressional malpractice cause of action, Congress did not intend to preempt a whole panoply of state law in this area.' *Painters [of Philadelphia Dist. Council No. 21 Welfare Fund v. Price Waterhouse]*, 879 F.2d [1146] at 1153 n.7 [(3rd Cir. 1989)]." (App. 18a) (emphasis added).

From this passage, it is apparent that the Court of Appeals did not simply adopt a *per se* rule that claims involving nonfiduciary conduct are immune from ERISA pre-emption.

How then, in light of the just-quoted passage, can we make sense of the following attempt by the Petitioners to summarize the Court's rationale: "Its opinion concluded that since the conduct of Petitioners, as nonfiduciaries, 'is not regulated by ERISA' (App. 19a), then State laws regulating such conduct are not pre-empted by ERISA." (Pet. 15). If we look at the cited page of the Court of Appeals' decision (App. 19a), we discover that the Court was responding to the *Petitioners' argument* that, because their conduct is regulated by ERISA, ERISA pre-empts Respondent's cause of action. *In response* to that argument, the Court stated that ERISA does not regulate the conduct of nonfiduciaries such as the Petitioners. And that was that. The Court did not, as Petitioners state, leap directly from their nonfiduciary status to the absence of ERISA pre-emption. If the Court had done so, it is likely that Petition-

ers would have provided a citation to the relevant pages in the Court's opinion. In short, the fiduciary-nonfiduciary distinction that Petitioners see as a "cornerstone" is in fact only a single brick in the edifice. The true cornerstone is the Court's analysis of the effects, or absence thereof, that Respondent's claims will have on the Catalina Plan.

Petitioners also exaggerate the importance of the fiduciary-nonfiduciary issue as it has emerged in the decisions of other courts. Petitioners would have this Court believe that the federal and state courts are divided into two groups: (1) those who hold that claims against nonfiduciaries are immune from ERISA pre-emption even when the claims "relate to" a plan, and (2) those who hold that no such immunity exists. (Pet. 13-17). Actually, the situation is not quite so simple.

To begin with, many of the courts placed by Petitioners in the immunity-for-nonfiduciaries camp were dealing with factual situations in which the state laws' effects on employee benefit plans were tenuous, remote, and peripheral. In these cases, even if they were before this Court for review, the findings of no pre-emption would be affirmed based on the lack of a relation to an employee benefit plan within the meaning of ERISA. For example, in *Kelly v. Pan-American Life Ins. Co.*, 765 F. Supp. 1406 (W.D. Mo. 1991), the Court held that state law claims including negligent misrepresentation against nonfiduciary agents of a health insurer

were not pre-empted. This was despite the fact that the misrepresentations concerned whether the plaintiffs were covered under an employee benefit plan. "Neither [agent] is responsible for assuring the continued viability of the Pan-American group insurance plan," the Court explained. *Id.* at 1410. "Any recovery against [the agents] *would have no effect on the plan.* Any remedy had against [the agents] *could not include injunctive relief affecting the plan* because [the agents] do not operate or control the plan." *Id.* (emphasis added). Moreover, the Court found that the cross-claims between the agents were likewise not pre-empted: "Neither [agent] is an ERISA fiduciary. Any recovery by either would not relate to an ERISA plan." *Id.* For these reasons, the Court found no ERISA pre-emption. *Id.* On close examination, therefore, it is apparent that the absence of fiduciary status was merely one part of the Court's analysis and not, as the Petitioners imply, the only test. In other words, the fact that the insurance agents were not fiduciaries was relevant to deciding whether the claims in fact related to an ERISA plan, but was not controlling. In this same vein are other cases cited by Petitioners, including *Sparks v. Mo-Kan Iron Workers Pension Fund,* 765 F. Supp. 566, 567 (W.D. Mo. 1990) (no ERISA pre-emption where state law claims and relief sought against nonfiduciaries "would not affect the Plan") and *Jordan v. Reliable Life Ins. Co.*, 694 F. Supp. 822, 833-34 (N.D. Ala. 1988) (no ERISA pre-emption of state law claim for benefits under non-ERISA insurance policy where recovery would have

no effect on any ERISA plan).

Petitioners make much of the *dicta* in *Painters* and *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531 (7th Cir. 1991), in which the Courts declined to recognize pre-emption of state law claims against nonfiduciaries where the claims did arguably "relate to" a benefit plan. In both those cases, for example, pension plans or their trustees were parties who sought recovery of monies that would become assets of the plans. *But those cases are not before this Court.* Here, the relationship between the state law claims and the employee benefit plan was so tenuous, remote, and peripheral as to be virtually non-existent, and it is this tenuousness that ultimately justifies the Court's holding. As the Court of Appeals explained:

> "But in *Painters* the plaintiff was the plan itself, and any recovery would have become an asset of the plan. That was not enough, however, for the state common law underlying the malpractice claims to 'relate to' the plan. Here, Shofer is a plan participant, but he seeks to recover, for himself, personal funds expended for individual tax liabilities and consequential expenses. The state law claims of Counts I and II of Shofer's second amended complaint *are not as 'related to' a plan* as were the state law claims in *Painters*." (App. 12a) (emphasis added).

Therefore, assuming *arguendo* that a split of authority exists over whether state law claims against nonfiduciaries are immune from ERISA pre-emption even when the claims "relate to" a plan, the decision of the Maryland Court of Appeals does not present this Court with an opportunity to heal that breach. Even if this Court wished to address that issue, this Court would nevertheless be constrained to affirm the decision below based on the absence of a sufficient relation to the Plan.

C. Respondent's State Law Claims Do Not Supplement Rights Already Secured by ERISA.

Section B of the Petition argues that, because Respondent's state law claims merely supplement actual remedies provided by ERISA, the state claims are pre-empted. (Pet. 12-13). This argument introduces several contradictions and puzzles; it is possible to catalog them but not to make them cohere:

1. All of the cases cited by Petitioners involved injuries for which ERISA actually provided a remedy, so that the duplicative state law claims were obviously pre-empted. (Pet. 13). In order to come under the rule of those cases, Petitioners felt compelled to assert that Respondent's Counts IV through VIII stated valid ERISA claims for breach of fiduciary duty, cognizable under 29 U.S.C. § 1132(a)(2). (Pet. 12). But how can Petitioners claim on Page 13 that Respondent's rights are therefore "secured by ERISA" while conceding on

Page 9 that Petitioners were *not fiduciaries?* What good is a claim for breach of fiduciary duty when asserted against nonfiduciaries? Ultimately, Petitioners are estopped from taking advantage of the cited cases because, for purposes of this proceeding, Petitioners concededly were not fiduciaries whose conduct could be reached under § 1132(a)(2).

2. Petitioners state: "This conjunction of ERISA and Maryland common law claims should have been dispositive of the pre-emption question." (Pet. 13). Unfortunately, in order to argue for a "conjunction" that ends all further argument, Petitioners are forced to reject the long accepted and approved practice of pleading in the alternative. The Maryland Court of Appeals recognized what the Petitioners refuse to accept: that the ERISA counts were pleaded in the alternative. (App. 21a).[7] When independent counts are pleaded in the alternative, the failure or dismissal of one does not defeat the others.[7] Indeed, Respondent sought to voluntarily dismiss the ERISA counts but was thwarted by Petitioners' refusal to consent. (App. 6a n.4). Thus, there was no indissoluble "conjunction" between the state law counts and the ERISA counts.

---

7. Maryland Rule 2-303(c) states in pertinent part: "A party may set forth two or more statements of a claim or defense alternatively or hypothetically. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements."

3. Petitioners confuse the issue further by equivocating on the word "alternative." Petitioners state: "The decision below rationalizes the ERISA enforcement action 'essentially as an alternative pleading' (App. 21a), a mere option to be pursued if Respondent's State law claims are pre-empted. However, this Court recognizes no State law "alternatives" to the ERISA enforcement mechanism." (Pet. 12). By switching meanings in mid-stream, Petitioners equate "alternative" pleading with "alternatives" to the ERISA enforcement mechanism. As discussed above, alternative pleading refers to independent claims asserted in the same pleading; but alternatives to the ERISA enforcement mechanism would be state law remedies that supplement or supplant ERISA remedies, contrary to the intent of Congress. The two concepts of "alternative" are separate and distinct.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ANTHONY P. PALAIGOS
THOMAS A. BOWDEN *
BLUM, YUMKAS, MAILMAN,
GUTMAN & DENICK, P.A.
1200 Mercantile Bank
& Trust Building
2 Hopkins Plaza
Baltimore, Maryland 21201
Attorneys for Respondent

* Counsel of Record

January 13, 1992